UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

BRENDA KOEHLER, et al,	)	
	)	
Plaintiffs,	)	Case No. 13-CV-885
	)	Milwaukee, Wisconsin
vs.	)	
	)	December 22, 2022
INFOSYS TECHNOLOGIES LTD, INC., et al,	)	10:02 a.m.
	)	
Defendants.	)	

TRANSCRIPT OF ORAL RULING
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES CHIEF DISTRICT JUDGE

APPEARANCES:

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

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THE CLERK: Court calls Case No. 13-CV-885, Brenda Koehler, et al v. Infosys Technologies Ltd, Inc. Please state your appearance starting with the attorneys for the plaintiff.

MR. KOTCHEN: Good morning, Your Honor. Daniel Kotchen of Kotchen & Low. And with me is Linsey Grunert.

THE CLERK: For the defendants.

MS. ORR: Good morning, Your Honor. Cheryl Orr and Samantha Rollins on behalf of Infosys.

THE COURT: Good morning to everyone. Thank you for taking the time this morning ahead of the holidays or during the holidays depending on what you're celebrating how you look at it.

As you all recall, we were last together, at least on the phone, for a status conference in November, November 10th. And at that point, I indicated that I had ruled on the *Daubert* motion, and the ruling on that motion had lead to rulings on the motion for class certification and so forth.

I scheduled the status hearing to ask I guess mainly the plaintiffs what next steps they wanted to take. I had anticipated, and I think I said this at the hearing, that perhaps the plaintiffs might want to modify to some extent their response to the Motion for Summary Judgment given the rulings.

But instead what Mr. Kotchen proposed was that the plaintiffs wanted to propose a new expert, a new expert opinion. I think he indicated that they thought -- the plaintiffs thought they had an expert that could address the concerns that I had expressed with Dr. Neumark's methodology, and they also had wanted to reopen discovery to address discovery produced after the discovery cutoff had passed, specifically the People Fluent information that had been received from People Fluent, and then the privileged log documents.

I took some brief argument on that. I think defense counsel offered briefing, and I told you all that I didn't think anymore paper was necessary in this case, but that I wanted to take a look at a few things before I gave you my ruling. And I gave you a date by which I would give the ruling, and then obviously on that date told you that I was going to address you today because it frankly took me a little bit longer than I had anticipated. I should have realized that what I wanted to do was look back through the docket and see what had transpired in front of Judge Jones. I was not present at all of those hearings; although, there were times when I felt like I was because quite frequently after he had a hearing with you all, Judge Jones would wander down the hall or I would wander down the hall to his office, and we would talk about the issues that had come up and what you all were thinking, and he would frequently say to me folks want more time for this or they're

thinking about extending the time for that, is that okay? And I would say, yes.

So I wanted to actually go through the docket and see what had transpired and get a sense of whether any of these issues had been dealt with in front of Judge Jones or not. And that turned out to be a little bit more of a time slot than I thought it would be because I guess I should have known all of the number of times that you appeared in front of him and the number of hearings that you had and the water that passed under the bridge. But I didn't estimate it properly, so it's taken me a little bit longer to get through to do that.

So I asked you to join me here on the phone today so that I could give you an oral ruling on the plaintiffs' oral request from November 10th, the oral request to reopen discovery to allow the plaintiffs to name a new expert and provide new expert disclosures and the oral request to reopen discovery and to avoid -- given the length of this case and its history. To avoid anybody sitting on tencher hooks, I'm going to first tell you that I'm denying both of those motions, and then I will then explain why.

I'm going to take the expert witness request first. As you all know, this case was filed on August 1st of 2013. And even in the original complaint, it was filed as a pattern or practice case. So as far back as August the 1st of 2013, the plaintiffs knew that they were going to have to make a prima

facie case of discrimination. And the case law dating back to *Teamsters* and, perhaps, even earlier emphasized the need for statistical analysis to be able to make such a prima facie case.

The complaint was amended in September of that year, and again it didn't change the fact that the case was alleged as a pattern or practice case.

When the parties filed their first proposed case schedule, the Rule 26F plan, in July of 2015, by that time the case had been reassigned to me. They proposed -- The plaintiff proposed simultaneous Rule 26 expert disclosures seven months after the issuance of the scheduling order whenever that may be, and then they proposed a bifurcated discovery schedule.

We had the Rule 16 conference on August 12th of 2015. Already I was noticing that there seemed to be two different lawsuits being pursued, one by the plaintiff and one by the defense. But at any rate, I ordered a fact discovery deadline of June 13, 2016; on August 15, 2016, deadline for disclosure of experts. I did not adopt the plaintiffs' suggestion that there be simultaneous expert disclosure. I ordered sequential expert disclosure.

The plaintiffs were to disclose their experts by September 13, 2016, and that would have been 13 months after the scheduling order, so I almost doubled the amount of time that plaintiffs had asked for to propose an expert. At that point, we were two years into the litigation. The plaintiffs know that

they filed a pattern or practice case, so they know they'll have to carry the initial burden of proving a regular pattern or practice of discrimination by a preponderance of the evidence. They know that the Seventh Circuit has emphasized the importance of statistics in making those findings, and I've given them almost twice the amount of time that they had requested to propose that expert.

There were a number of hearings that proceed after that. In fact, there's Judge Joseph and back in-between. And eventually the topic came up in May of 2016 of possibly extending the discovery deadline. No motion of experts, just extension of discovery deadline. And around that time, I referred the case to Judge Jones because it looked like there were going to be a number of discovery issues, and I will come back to those in a moment.

So we continue on through the fall of September 16th. The discovery deadline actually closes on September 16, 2016, without as best I can tell calling to the docket anyone asking for an extension of that deadline and no mention of extending the deadline for experts. There's a request for dispositive motion deadline to be extended in early September, but no request to extend the deadline for experts.

On September 22nd of 2016, nine days after the plaintiffs' deadline for disclosure of their experts, there was a hearing. There was a discussion of filing a class

certification motion. There was some vague discussion of the briefing schedule for the class certification motion, and it appeared from what I could tell from the minutes that the plaintiff had, in fact, disclosed their expert report on the deadline -- September deadline because the defendants were expressing concern about some of the information that they had seen in that report.

In particular, they thought perhaps there were other witnesses out there whom they have not been made aware of. By now by September 22nd of 2016, the plaintiffs have obtained some discovery. They know that they're alleging a pattern or practice of discrimination in favor of "Southeast Asians". They didn't seek an extension of the deadline for disclosing the expert, and again that deadline was an extended one from the one that they had requested.

The first document that gets filed on the docket that relies on or references Dr. Neumark's analyses is the Motion to Certify the Class. It was originally filed on September 24th at Docket Number 81, and it was refilled again on October 17th at Docket Number 88.

And as I said in my -- in my order of September this year, that motion was riddled with references to and reliance on Dr. Neumark's opinion. So once that's out there, the opinion is in play. It is about two months later not quite, December 19, 2016, that the defendants filed their Motion to Include

Dr. Neumark's opinion, their *Daubert* motion at Docket Number 97.

So as of December 19, 2016, the plaintiffs are on notice that the defendants believe that there are numerous deficiencies in Dr. Neumark's analysis and in Dr. Neumark's methodologies.

At that point arguably, the parties could have or the plaintiffs could have gone to Judge Jones and said, look, some concerns have been pointed up, we want some additional opportunity to see if we can't find another expert who would address those concerns that the defense has expressed, but that's not what the plaintiffs did.

As I said, defendants filed their motion on December 19th of 2016. There was a hearing before Judge Jones on December 23rd just a few days later, and there was no mention of, you know, our expert's been challenged, can we have an opportunity to, perhaps, consider proposing new experts? All of the discussion was about having recently gotten information from People Fluent.

The plaintiffs filed their opposition to the *Daubert* motion on January 17th of 2017, again no request to try to find a new expert. Instead, there was some discussion of having received People Fluent documents at that point.

So throughout the briefing on all of the motions that got filed in September, October, November, December, January all through that period of time 2016 and 2017, the plaintiffs never

proposed the idea of attempting to find another expert or extending the deadline for discovery to find another expert to try to address the concerns that had been raised in the *Daubert* motion.

Everybody knows, of course, that the *Daubert* motion was pending for a very extended period of time and that, of course, lies entirely on my plate. But the point that I make in raising that issue is that there was quite a long period of time where the *Daubert* motion had been fully briefed. In fact, the other motions as well had been fully briefed, and the parties were expressing concerns understandably to Judge Jones about what was taking me so long and whether there was anything they needed to be doing. But there were years during which the plaintiffs could have stepped forward and said, you know, we know that there's this issue that's been presented with experts, is there an opportunity for us to try to bring in another expert to supplement Dr. Neumark, or could we sort of stop the clock and propose a new expert? Pretty much what the plaintiffs proposed to do at our last status conference back in November.

The Seventh Circuit has spoken to this issue, and they've spoken to it several times. The first decision that I will commend to you is a case called *Winters, W-i-n-t-e-r-s, v. Fru-con, F-r-u - c-o-n*, 498 F.3d 734, a Seventh Circuit decision from 2007.

And without going into too terribly much detail about

the facts of the case, what had happened was that one of the parties, *Winters*, had proposed experts. The district court, similar to what I did with Dr. Neumark, rejected those experts' tendered testimony finding that they had not conducted some testing or utilized any other the method of research to compensate for failure to conduct testing and so excluded those experts.

And when one gets to page 743 of that decision, one reaches this point. Finally, *Winters* argued that the district court erred in failing to reopen discovery to allow his proposed experts to conduct testing of their alternate designs. *Winters* sought to reopen discovery after the district court decision barring his proposed experts. "We reviewed the district court's decision not to reopen discovery for abuse of discretion", quoting *Raymond v. Ameritech Corporation*, 442 F.3d 600 at 603 Note 2, Seventh Circuit case from 2006.

The litigation process does not include "a dress rehearsal or practice run" for the parties, quoting *Steen, S-t-e-e-n v. Myers, M-y-e-r-s*, 486 F.3d 1017 at 1022, a Seventh Circuit case from 2007. "Winters had ample time to develop his case and conduct his testing of his alternative design during the discovery period. His inability to produce admissible expert testimony is due to his own actions, namely the failure of his proposed experts to test their alternatives. The district court was not required to give *Winters* a "do over", and

therefore we find the district court did not abuse its discretion."

The second case that I'll refer you to is *Bielskis, B-i-e-l-s-k-i-s v. Louisville Ladder Inc.*, 663 F.3d 887, a Seventh Circuit case from 2011. A similar thing had occurred in the *Bielskis* case. There had been an expert that had been rejected by the district court, and *Bielskis* then made a Motion for Continuance to obtain a different expert, pretty much identically to the request being made by the plaintiffs here.

And in making that request, *Bielskis* relied on another Seventh Circuit case, a case called *Smith v. Forward Motor Company*, 215 F.3rd 713 at 718, a Seventh Circuit case from 2000. And the court said, "To support his argument, *Bielskis* again relies on *Smith*. Because we remanded in *Smith*, we explicitly declined to reach the issue of whether the district court had abused its discretion by denying a continuance. We noted however in *Bielskis* relies heavily on this observation that "courts have generally found an abuse of discretion" when "a trial courts own action causes a need for continuance and that court then denies the continuance resulting in prejudice to a party", citing *Smith* at 722.

The two cases *Smith* cites in support of that proposition however are entirely distinguishable. In *Fowler v. Jones*, 899 F.2d 1088 at 1095, an Eleventh Circuit case from 1990, the court concluded that in forma pauperis litigant should

be entitled to rely on the US Marshal to serve process, and thus the district court had abused its discretion by denying a continuance to allow the plaintiff to perfect service on three defendants, *Fowler* at 1095 through 1096.

In the second case, the Ninth Circuit concluded that a defendant corporation was denied a fair trial after the district court assured the corporation that it would accommodate the travel schedule of the corporation's expert, but then concluded the trial before the expert could return from the scheduled trip and testify. *Fenner, F-e-n-n-e-r v. Dependable Trucking Company*, 716 F.2d 598 at 601 through 602, a Ninth Circuit case from 1993. And there's a quote from that case in the Seventh Circuit decision here. "The district court's statement to counsel that it would work out the problems faced by the defendants because their expert would be unavailable until July 20th lulled Dependable and Ralphs into a false sense of security that the absent witness would be allowed to testify."

So the Seventh Circuit went on to say, "unlike in those cases, the district court here did not affirmatively "cause" the need for a continuance." The district court has broad latitude in determining when to grant a continuance e.g. *Maurice v. Slappy*, 461 US 1 at 11, a 1983, and *United States v. Smith*, 562 F.3d 866 at 871, Seventh Circuit case from 2009. The quote from that case is "whether to grant or deny a continuance is a matter of case management."

The Seventh Circuit said, "we will overturn the district court's decision only when the judge has acted unreasonably and actual prejudice is shown", and that's quoting from the *Smith* case 562 F.3d at 871.

"Although the question is a close one, we do not believe the district court here abused its discretion. Discovery had closed when *Bielskis* requested continuance to obtain a new expert". The district court was entitled as a principal of case management to refuse *Bielskis'* request for a second bite at the expert witness apple, i.d. at 871 "having given *Smith* a fair opportunity to retain a suitable expert, the court was under no obligation to let him have another chance to present expert testimony. If at first you don't succeed, try, try again might be a memorable maximum, but it is ill suited as a principal for case management."

So the Seventh Circuit has at least twice and there may be other cases, but those are the two that I found on a quick search, at least twice upheld the district court's refusal to either grant a continuance in a case or to reopen discovery, whatever procedural mechanism you want to call it, to allow a party whose expert has been rejected or excluded to somehow rehabilitate that expert or to find a new expert.

There are also a number of district court cases that have come to that same conclusion, several of them out of the Northern District of Illinois as you might expect, but I think

the Seventh Circuit cases make the point.

So the case law indicates that there is support for district court judges, as a matter of case management, declining to give the parties a second bite at the expert apple. And in a case like this one where the scheduling order didn't even come out until quite sometime after the case had been filed and the scheduling order gave the plaintiffs more time than the plaintiffs themselves had proposed to produce an expert, and after the plaintiffs had produced that expert they were put on notice by the defendants at the end of 2016 that the defendants at any rate thought there were significant deficiencies with that expert's methodologies and conclusions, and the parties had because of my delay a significant amount of time during which they could have either sought from Judge Jones or me -- the plaintiffs could have -- additional time to either file a supplemental expert or to try to rehabilitate Dr. Neumark or to try to find an expert who could replace Dr. Neumark.

The plaintiffs didn't do any of those things. The plaintiffs waited until I had ruled on the motion -- on the *Daubert* motion and found Dr. Neumark wanting and excluded his expert testimony to then come back at this extraordinarily late stage in the game and ask now to start over again.

There is also some of the district court cases that talk about the practicalities of proposing a new expert deep into the litigation. The fact that that would reopen expert

discovery at the very least that defense would have the opportunity to depose that expert, possibly propose an expert to address the new expert, and the extent to which that would slow down issues. And in this case, it could conceivably lead to some parties may -- maybe the plaintiff, maybe the defendant, I can't necessarily know how that would play out, asking to go back to square one and start over with other motions like class certification, class certification motion or summary judgment motions. It is in many respects as if we would be turning back the clock and starting all over again on a number of the pleadings that have already been filed.

While taking full responsibility for the extensive delay that occurred before my colleague Brett Ludwig was appointed to the bench and then during some of the insanity that was happening during the pandemic, those delays are all mine, and I take responsibility for those. But the fact remains that there have been a number of delays of all sorts, and this case has been pending for an extended period of time. And it would be deeply prejudicial to the defendants and to basically the system and the progress of the case for the plaintiffs to be able to at this very late stage come in and as the Seventh Circuit said in one of those cases get a do over or a try, try again to try to produce an expert that didn't have the issues that I identified with Dr. Neumark.

So I am not going to grant the oral request made at

the November 10th hearing to allow the plaintiff to propose a new expert. For very similar reasons although from a historical, chronological background and slightly different ones, I'm not going to grant the request to reopen discovery and to conduct further discovery on information that was provided after the discovery deadline.

Now, I understand I worked my way back through the docket a couple of times. And as I indicated, after some request for extension of the discovery deadline which Judge Jones granted and I think on at least a couple of them he conferred with me as best I recall, the final discovery deadline landed on September 16, 2016, and I couldn't find anywhere in the docket that anybody had filed a motion or made a formal request at any of the hearings in front of Judge Jones to extend that deadline.

When the plaintiffs responded to the *Daubert* motion, this is now fast forward a couple, three months to December or January, December of 2016, January 2017, the plaintiffs brought up the fact that they had only recently received returns on their subpoenas to the People Fluent Company. They indicated that they had gotten some of the People Fluent documents on December 13th of 2016, and that's obviously after the September 16th deadline even though they filed their subpoena ahead of the September 16, 2016 deadline.

And then they said that they got another chunk of

documents or notice of information for People Fluent on January 17th of 2017. So I don't think there's any question, and it doesn't sound like anybody disputed even in front of Judge Jones that People Fluent responded to the plaintiffs' subpoena after the deadline for completing discovery had passed.

And in fact, the plaintiffs brought that up directly at a status conference in front of Judge Jones on January 30th of 2017. They were talking -- The parties as best I can tell were discussing the plaintiffs, perhaps, needing an extension of time to file their reply brief in support of their Motion for Class Certification.

And at that point, the minute entry indicates that the plaintiffs brought up the fact that they had received data relating to hiring, promotions and terminations from this third party company, People Fluent. The plaintiffs expressed the concern that this data was different from the date they already received from Infosys. They thought Infosys may be misrepresenting data, and the fact that they hadn't had it before they were filing their various motions was prejudicial. The statement was even made that the plaintiffs felt that the case could have been over by that time by January 2017 if the plaintiffs had had that information earlier.

And Judge Jones kind of said at this hearing so what are you -- What are you wanting me to do about it? And the upshot was that he directed the parties to figure out a plan on

"how to handle this new information." There was no formal request at that time to reopen discovery. It is just Judge Jones saying you guys get back to me and give me some kind of plan with how you want to deal with this.

Interestingly after that hearing on February 6th of 2017, the plaintiffs went ahead and filed their reply brief in support of class certification. So the next thing that came down the pipe was not look, we need to call a reaching halt to everything, we need to reopen discovery, we've got some new stuff here we have to track it down and figure it out. The plaintiffs elected instead to file their reply brief in support of class certification.

That being said, the issue kept coming up. There was a February 10, 2017 status conference before Judge Jones. Somebody ordered a transcript of it because it's Docket Number 138, and I read through that entire transcript. And again, the plaintiffs representing this notion that they had recently gotten People Fluent's data, and that it would have been much more helpful to them to have had that data earlier in the process and to have been able to use it prior to when they were filing their motions.

I think Mr. Kotchen may have been speaking on behalf of the plaintiffs. He said this issue with People Fluent data has left us again in a very procedurally awkward situation. We wasted what I think of is about a year and-a-half because if we

knew about this data before, it would have focused all of our discovery. It would have changed the custodians we would have been searching for and requesting. The case would have probably been resolved by now. And he said, now there's a motion from the defendants for summary judgment, our motion for partial judgment, the class certification motion and a *Daubert* motion, and none of it incorporates what we think of as dispositive data except for our class certification reply, summary judgment reply briefs.

And at this point, Judge Jones starts to push back a little bit, and he asks if he's understanding correctly that the plaintiffs already had the data underlying the People Fluent discovery. People Fluent had organized it and classified it and apparently put it in some charts, and some of those charts are referenced in the reply to the summary judgement motion.

But Judge Jones said isn't it true that you all had the underlying data that People Fluent used to create those charts and conduct those analyses? And the plaintiffs responded, well, we didn't have the benefit of the analyses, the work that People Fluent did with that data.

And at that point, Judge Jones said, look, you guys are going to have to figure something out here, and he asked specifically do you think you need to file some sur-reply or some additional briefs in either opposition to a *Daubert* motion or in opposition to summary judgment? He went further and said

if you think you need another round of responding or of opposing summary judgment or supporting your class certification, then make that proposition and give me a specific type of schedule on how you would want to do it. This is at pages 23 and 24 of the transcript at lines 22 through 25.

And then he went on to instruct everybody to sit down and think out what you have and what you need. Maybe all you need to do is supplement some assertions in the proposed findings of fact. He said, I don't know just think about it and do it. He also threw in don't brother meeting and conferring because you're not going to agree as far as I can tell, just file what you want.

Well, again instead of anybody filing documents saying, okay, here's what we think we need to do, we think we need more time to respond to this, we think we need to supplement that, we think we need to explore these issues before we do any further briefing, the next thing that happens is on February 16th of 2017, six days later, this is at Docket Number 123, the plaintiffs simply file their opposition to the *Daubert* motion, and the defendants on September 28th file their opposition to class certification, and so the briefing just continued.

We get to March 10th of 2017, this is at Docket Number 129. And what the plaintiffs end up doing is they file a document called Motion for Leave to File "Sur-Reply" in support

of their Motion for Class Certification. Again, that's at Docket Number 129, March 10th of 2017, and they indicate that they're doing this in response to Judge Jones' February 10th indication that they should figure out something, file some briefing or something regarding the effect of the People Fluent documents.

This is -- The cure I suppose if you want to put it that way that the plaintiffs ask for is they say they need to file the sur-reply that they are proposing to "address arguments raised by Infosys for the first time in their sur-reply attacking their own affirmative action analyses." That's at page 2. And the plaintiffs say that they want to address the prejudice that's caused by Infosys withholding the People Fluent information.

At Docket Number 129-1, also filed on March 10th of 2017, there is a proposed supplemental brief. That's the one that the plaintiffs were asking to file. And what that brief does is it argues that the People Fluent data are reliable and that the Court should rely on the People Fluent data in granting the Motion for Class Certification. I noted this in my order from back in September that the fact that the plaintiffs basically said, okay, you know if you don't think that Dr. Neumark's analysis is appropriate, you could just rely on the People Fluent analysis. You can make your decision that way.

So again, there's no request to reopen discovery to explore further the People Fluent data, to follow up on them. The cure that the plaintiffs chose was to file a supplemental brief saying the People Fluent data are reliable, and you can use them.

So that's where things stand in March of 2017, and Judge Jones granted that request to file the sur-reply on March 17th of 2017 at Docket Number 131. And again, there was discussion. The plaintiff said we think we've been prejudiced, and we're going to think about filing a Motion for Sanctions. And Judge Jones said, well, meet and confer before you do that.

If we move forward into May, the plaintiffs file a Motion for Sanctions and a Motion to Compel. That's at Docket Number 134. And in amongst the various allegations that the plaintiff makes in that motion is their request to ask for additional discovery. That request though indicates that the plaintiffs want to introduce evidence at trial that Infosys engaged in misconduct, and they want fees and costs.

And this motion goes back through what it is that the plaintiffs asked the defendants for, how they had phrased their discovery requests, and why they believed that the phrasing of their discovery requests ought to have tipped off Infosys that they wanted the People Fluent data.

They talk about their July 24, 2015 discovery demand asking for documents "related to the demographic or statistics

of Infosys' United States workforce." Infosys had objected to that saying it was a really, really broad discovery request, and it would impose a burden. This was battled out in front of Judge Jones, and it resulted in Infosys being ordered to produce data and Infosys did produce what the plaintiffs characterized as raw data in November 2015, hundreds of thousands of fields and codes and employees.

The plaintiffs argue that it was very difficult to figure all this stuff out and figure out what it meant. And the upshot of this argument was that the way that People Fluent packaged the information was much easier to follow and to understand and to track, and so the plaintiffs were arguing, look, this would have been much more helpful to us, but Infosys never told us that they had the People Fluent analyses and claim that they had produced everything that they had.

So that was the substance of the Motion for Sanctions. That entire motion got briefed, and there was an oral argument before Judge Jones on June 2nd of 2017. That's at Docket Number 142, and the transcript of that hearing is at Docket Number 143. And again after having read all those arguments and heard the oral argument when it came time for Judge Jones to speak, he had again expressed concern that it appeared to him that the People Fluent documents on the one hand certainly would have been helpful, and he agreed that there was one reading of the discovery demand that could arguably have included a request for

the People Fluent documents.

But he said what he doesn't understand is how you would specifically have changed anything that your expert said in regard to either class certification or summary judgment if you had had the People Fluent documents. "That is to say what additional argument that he could not make because he did not have these documents would you have preferred or would you have liked to have put on the record in regard to class certification or summary judgment". That's at pages 5 and 6 of the transcript.

There ensued a discussion where the plaintiff said, look, we asked for affirmative action materials. And as far as we're concerned, that's People Fluent. And Judge Jones interjected and said, yeah, I don't see those two things as being the same thing. But either way, I'm asking you, you know, what would that have contributed to Neumark's analysis? And are you basically telling me that the People Fluent documents just would have buttressed or supported Mr. Neumark's analysis?

Mr. Kotchen referred, yes, that's what we're saying, and then he said, but we don't know if there's anything else out there that maybe Infosys hasn't given us that would have been helpful. So there's a lot of discussion back and forth where counsel for Infosys explaining, you know, what they turned over and why and how they read the discovery demand and, you know, why weren't we asked earlier if they thought there was some sort

of other iteration out there, and so there's a lot of back and forth.

But eventually, Judge Jones asked the plaintiffs if they'd agree to follow-up discovery on Sandra Jackson, who was the Affirmative Action Director. There was some discussion of whether there was some central repository of Affirmative Action documents. And at this point and I think there was referenced at the last hearing, Judge Jones brought up my name and said, you know, Judge Pepper's wondering what's going on? And Mr. Kotchen said, well, we don't want any delay on the existing motions. We want the existing motions decided basically divorcing the discovery issue from the motions that already had been filed.

And so there was some further discussion about talking and trying to figure out how Affirmative Action and People Fluent related to each other and, you know, if there's anything from People Fluent -- that Affirmative Action that wouldn't -- information that wouldn't have been covered by People Fluent. And I think Judge Jones ended it by saying or actually Mr. Kotchen made a point. Mr. Kotchen said toward the end of the hearing, one point of clarification if your question to me earlier, is there anything from People Fluent that should have, you know, we could have but didn't and Judge Jones said, yeah. Mr. Kotchen says, "In class certification for instance if there's a question about whether or not the existing motion

should be, you know, prolonged and the process goes on, we would err in favor of just having those motions decided." Judge Jones says, understood. Okay, that's actually helpful, Mr. Kotchen, because I can -- Judge Pepper is very conscious of giving everyone a full opportunity but she's also conscience of, you know, making people wait when they don't need to so I'll be happy to pass that along. And the defense chimed in said, we don't want whatever discovery issues are to hold up the motions either.

So Judge Jones denies the Motion for Sanctions without prejudice, denies the Motion to Compel, grants it in part. And then, there's some further discussion of what the parties are going to talk about at that point.

And then as you know, there's an extended period of time during which I did not, contrary to what Judge Jones optimistic and helpfully told everyone, I did not move the case as quickly as possible. In that interim period, there was a lot of discussion about the privileged logs, and he started going through the privileged logs and looking at all the various entries and making determinations about what should or shouldn't be released and what should or shouldn't be redacted.

That all culminated in on September 30th of 2019 with Judge Jones deciding a number of the privileged log issues. And I think I had that Docket Number -- I don't know if I -- I don't know why I have it at Docket Number 55. That is not

correct. Anyway, he issued a decision regarding the privileged log issues but as best I can tell didn't -- Sorry, it's docket 187. There it is in my notes. But he finished his order this way. He ruled on a number of the privileged log documents. At the end he said, "The Court further finds that its rulings on these matters will necessitate defendants further review of the entirety of their privilege log and a downgrade in production of additional documents in a manner consistent with the Court's rulings on the subset of documents discussed in this order. The Court orders that such review be stayed pending rulings on the pending dispositive motions given the expense and effort involved in this task."

So there were a number at that time of pending dispositive motions, the Motion for Class Certification, the plaintiffs' Motion for Partial Summary Judgment, the *Daubert* motion and the still now pending defendant's Motion for Summary Judgment, and he stayed rulings on the privileged log issues until the -- all of those motions could be decided.

So there were -- There was extensive discussion about the People Fluent data. There was extensive discussion about the way these discovery requests were phrased and the way that Infosys understood them and responded to them and what it was that the plaintiffs thought that they were asking for.

All of that discussion -- throughout those discussions, Judge Jones had two different questions that he

continued to ask. One of them was didn't you already have this data just not in this form? And it seems to me that the plaintiffs answered that, yes we did, but having it in this form would have been a lot more helpful. And the other is, what would this data have changed about anything that you would have filed in these pending dispositive motions? And the answer to that seems to be, well, it just would have buttressed what was already said. And as it turns out, the plaintiffs did end up using the People Fluent data and the People Fluent information in their pleadings on the Motion to Certify the Class.

So other than the completion of the privileged log analysis which Judge Jones I think rightly said should wait until after the decision on all the dispositive motions due to avoiding any expense that might not be necessary depending on how those motions will be decided, I don't see what other discovery after all these years is necessary to reopen.

It also seems to me that given the amount of time that I lingered in making the decisions that I made, that even after the case left Judge Jones and was no longer in front of him and maybe after Judge Jones left, if the parties believed that there was outstanding discovery that they needed to continue to conduct as the days dragged on and the months dragged on and I was not making decisions in the case, the parties could have asked for that said, you know, look can we at least reopen discovery and keep moving forward on whatever it is we think we

need to move forward on given the fact that, you know, we're not getting a decision from the Court? I understand that that could be a costly endeavor as well because you could engage in that discovery. It could be extensive; although, it's hard for me at this point given all the water that's under the bridge to imagine that it would be very extensive. I think even last time we were together on November 10th, Mr. Kotchen sort of described it as limited. But that request, of course, could have incurred some cost. And then if I had ruled the way I did rule on some of the motions, that cost arguably would have been for naught. But those were requests that could have been made at any stage.

In particular, I have to say immediately after the turnover of the People Soft information because that's the point at which, you know, the discovery had been closed for two months. And then all of a sudden, there's information coming in in two dribs and drabs from People Fluent. And by January of 2017, the plaintiffs now realize, okay, there's some stuff out here that we didn't have, and we'd like to know more. It would have been reasonable to make a request of Judge Jones to reopen discovery at that point in time.

To make that request now five years on, it makes no sense at all whatsoever, and it causes some of the same problems that I indicated would be caused by allowing the plaintiff to now at that stage in the litigation try to produce a new expert.

And again, the Seventh Circuit has reiterated numerous

times that it is within the district court's discretion to determine whether or not to do things like extend discovery deadlines or grant motions to compel, et cetera. Just a handful of cases. Recent one the *Equal Opportunity Commission v. Wal-Mart*, 46 F.4th 587 at 601, the 22 version of the Wal-Mart case saying the district courts have broad discretion in discovery-related matters. That was in the context of a Motion to Compel, "But we will only reverse the district court's ruling after a clear showing that the denial of discovery resulted in actual and substantial prejudice." That's quoting *Gonzales v. City of Milwaukee*, 791 F.3d 709 at 713, a 2015 Seventh Circuit case.

Another case from 2018, *Guilbeau, G-u-i-l-b-e-a-u v. Pfizer Inc.*, 880 F.3d 304 at 318, Seventh Circuit case from 2018. "As a general rule, the appellate courts leave discovery to the sound discretion of the district court, so we review this decision only for an abuse of discretion." That's citing *Citizens for Appropriate Rural Roads v. Foxx*, F-o-x-x, 815 F.3rd 1068, 1081, a Seventh Circuit case from 2016.

In 2016-case called *Hassebrock, H-a-s-s-e-b-r-o-c-k v. Bernhoft, B-e-r-n-h-o-f-t*, 815 F.3d 334, the court again reiterated that discovery-related orders are viewed for an abuse of discretion and noted that the district court in that case had explained in denying a request to reopen discovery, that reopening discovery would prejudice the defendants because the

case was old, and it had already moved to the summary judgment stage and also that it would cause further delay and require the defendants to prepare new motions on potentially different grounds, and the Seventh Circuit said this reasoning is sound in all respects.

Finally, there's another Northern District of Illinois, which of course is not binding on me as a sister court but *Abbott Labs v. Torpharm, Incorporated*, Case Number 97-C-7515, 2003 West Law case, 22462611, Northern District of Illinois, October 29th of 2003. This is the asterisk, page 4, of the decision. "The time for discovery expired long ago, yet the court does not believe that after years of substantial discovery a ruling on summary judgment and a ruling on appeal discovery should be reopened at this advanced stage of the litigation for the purpose of discovering information that could have been made part of the case years ago."

We're not that far along of course, but we are years into the case. We do have rulings on the *Daubert* motion, the Motion to Certify the Class, the plaintiffs' Motion for Partial Summary Judgment and the only pending motion right now is the defendants' Motion for Summary Judgment with regard to the individual plaintiff.

And so in the same way that many of those cases talk about the prejudice that would inure by reopening discovery deep into the litigation, I believe the same prejudice would result

here.

Finally, I think and I know that I said at the November 10th hearing, I anticipated, perhaps, the plaintiffs might want to rework their response to the defendants' Motion for Summary Judgment. But as I went back through all of these docket entries and I went back through and read what happened in front of Judge Jones, as I've already discussed, Judge Jones several times asked the plaintiffs whether or not they wanted to have to go back and to supplement their filings with regard to the summary judgment, if they wanted he said another round of responding or opposing summary judgment, if they needed to file some additional findings of fact to respond to the Motion for Summary Judgment. And all of this was around the plaintiffs' argument that, hey, we've gotten this kind of dump of data from People Fluent, and we weren't able to use that before.

And the plaintiffs rejected all of those arguments. They went ahead. They briefed the motions despite the fact that they knew that they had gotten the People Fluent information after the close of discovery and despite their argument that they hadn't been able to fully incorporate it into their pleadings, and they went ahead and did incorporate it into some of their reply briefing and opposition briefing.

But the plaintiffs were given the very opportunity that I thought they might ask me for after my ruling. Judge Jones gave them that opportunity and gave them an opportunity

more than once and told them to propose a plan, and the plaintiffs didn't.

So I also don't think it is appropriate at this point for the plaintiffs to go back now and somehow modify their response to the defendants' Motions for Summary Judgment as to the individual plaintiff.

So for all of those reasons, I am not going to allow the plaintiffs to reopen discovery, to name or identify a new expert or disclose a new expert. I'm not going to allow discovery to be reopened with one exception and; that is, that depending on how the summary judgment motion goes as to the individual plaintiffs, assuming that any or all of those survive summary judgment, it would be appropriate I think to go back as Judge Jones indicated and complete the privileged log analysis once that decision has been issued.

And finally, I'm not going to give the plaintiff an opportunity to modify their motion for their response I should say to the defendants' Motion for Summary Judgment because they had that opportunity and did not take it.

So the next step in the process is going to be that I'm going to get you a ruling on the defendants' Motion for Summary Judgment. Once that ruling has been issued, then we'll see what our next steps are from there.

As Ms. Wrobel indicated at the beginning of this hearing, she recorded the hearing. If you would like to get a

copy of the actual recording -- First of all, I should say if you all probably are aware we post on the docket the audio of hearings. And so some days depending on how long it takes Ms. Wrobel to get this attached to the docket, you will be able to sit in your office and listen to this if you choose to do so. If you prefer to get a copy of the recording on a thumb drive or something of that nature, you can do that by calling the clerk's office and asking them for one, and they'll get that for you. And if you want a transcript, I think you already know you can go on the website and utilize our transcript order form, and you can order a transcript through the website.

So with that, that concludes my oral ruling on those oral requests. Anything further to take care of today, Mr. Kotchen?

MR. KOTCHEN: No, Your Honor.

THE COURT: Anything further from the defense?

MS. ORR: No, Your Honor.

THE COURT: Thank you, everyone. Take care. Have safe holidays and watch out for the weather tonight and tomorrow. It's supposed to be messy. Take care.

(Whereupon proceeding was concluded.)

C E R T I F I C A T E

I, SUSAN ARMBRUSTER, RMR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified March 15, 2023.

/s/Susan Armbruster

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